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in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

NO. 72-708

MANUEL NOA and RENE A. ROSQUETTE,
Petitioners,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeal for the Fifth Circuit, entered in the above styled case on June 7, 1972, Rehearing denied July 18, 1972.

II

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, is reported at _____ F.2d_____ and is printed at Appendix "A". The Order of the United States Court of Appeals for the Fifth Circuit denying the Petition for Rehearing and Petition for Rehearing En Banc is printed at Appended "B".

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 7, 1972; Rehearing denied July 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Is it a violation of a criminal Defendants right to a fair trial for the trial court not to grant a mistrial where a key government witness who is also a government agent makes a highly prejudicial comment while being crossed examined?

STATEMENT OF THE FACTS

The Petitioners in the instant case along with several other Defendants were charged with numerous violations of the Federal Narcotics Laws. The facts adduced at trial are as follows:

The Defendant, OCHOA, began negotiations with a Federal undercover agent, PETER SCROCCA, who was working with the Bureau of Narcotics and Dangerous Drugs. These two (2) men negotiated for a sale of Heroin. A tentative agreement was reached.

The undercover agent came to Miami and pursuant to instructions called the Sandman Motel where he spoke to a female, CLAUDINE LIEROS, who was also a Defendant in the court below. The agent was instructed to call the following day. On the following day SCROCCA contacted OCHOA and the latter informed him that final arrangements would be made. Apparently OCHOA was to contact his associate. During the conversation SCROCCA advised that a HARRY HEYMAN would be assisting in the transaction.

After several meetings Agent HEYMAN left with the Defendant LIEROS and Defendant OCHOA from the Sandman Motel and drove to an area in Miami. The group parked the car, OCHOA left, and after a short wait OCHOA arrived at the scene with several other individuals. Agent HEYMAN testified that one of the other individuals was RENE ROSQUETTE.

At the meeting place OCHOA and another Defendant PATINO discussed the sale of Heroin with Agent HEYMAN. Accordingly three (3) of the Defendants PATINO, OCHOA and LIEROS proceeded with Agent HEYMAN to drive to the Sandman Motel. After receiving a phone call at the motel the group drove to a residence in Northwest Miami.

At the residence HEYMAN observed the Petitioners, ROSQUETTE and NOA in the living room. When HEY-

MAN asked the Defendant PATINO about these men PATINO replied they were involved in the deal. From the house OCHOA, PATINO and the Petitioners along with Agent HEYMAN went to a small house located in the rear. There a bag of Heroin was opened and tested in the presence of PATINO and the Petitioner, NOA. The Petitioner, ROSQUETTE, was not in the room where the Heroin was weighed.

The Heroin was carried to HEYMAN'S car. HEYMAN, PATINO and OCHOA then proceeded to a meeting with Agent SCROCCA. Shortly thereafter the arrests were made.

During the cross examination of the governments key witness, Agent HEYMAN, the following occurred:

> "Q. I'm asking you, when you made this report, you indicated in the report that you had identified individuals and you named all of them, including PENTADO, ALONSO, ROSQUETTE and NOA, as being at that area, is that right?
> A. Yes, sir. I recognized ROSQUETTE from pictures of ROSQUETTE, because he is a documented trafficker in our files."

Counsel for the Petitioner, ROSQUETTE immediately moved for a mistrial. This motion was denied. When counsel attempted to argue his motion the Court would not listen. The record does indicate however, the motion for mistrial applied to all Defendants and was denied as to all Defendants. The motion for mistrial was renewed later in the trial. It was again denied.

REASONS FOR GRANTING THE WRIT

Agent HARRY HEYMAN, the governments key witness, testified on cross examination to the following effect:

"Q. I'm asking you, when you made this report, you indicated in the report that you had identified individuals and you named all of them, including Pentado, Alonso, Rosquette and Noa, as being at the area, (S. W. 8th Street and 57th Avenue) is that right?
"A. Yes, sir. I recognized Rosquette from pictures of Rosquette, **because he is a documented trafficker in our files.** (Emphasis added)

"MR. MORAN: At this point I am going to have to make a motion for a mistrial.

"THE COURT: Your motion is denied.

"MR. MORAN: The answer is unresponsive and is highly prejudicial and has nothing to do with the case.

"THE COURT: I don't want any argument. Your motion is denied. Proceed.

"MR. KLEINFELD: The defendant Ochoa —

"THE COURT: The motion will stand as though made on behalf of all defendants and will be denied as to all defendants.

"Proceed."

Further, later in the trial the Petitioner, ROSQUETTE'S counsel again moved for a mistrial stating:

"MR. MORAN: Your Honor, just briefly ( ) in addition in support of my motion for a mistrial that was made on behalf of Mr. Rosquette as to the comment made by the witness, I would indicate to the Court that I have spoken with the United States Attorney and have reviewed the record of my defendant, and it does not reflect a conviction for a narcotics violation of any kind.

"I would also point out to the Court, in addition to that, that this witness who made the remark was a trained witness, not a lay witness, and I think under all the circumstances of the way it was stated and the nature of the specific reference, it has, in fact, denied my defendant his right to a fair and impartial trial.

"THE COURT: That is not true at all. You have many opportunities on many matters in which you can ( ) prove that there has been no conviction if you desire to do so, as part of your case.

"MR. MORAN: What I was pointing to, Judge, was the remark made by a trained witness with knowledge of the fact that this man had not been convicted, and to make a reference unsolicited in a narcotics case that a man is a known trafficker in cocaine, I think the cases are legion that that is ground for a mistrial and denies this man a fair and impartial trial.

"THE COURT: I don't agree with you. The motion is denied."

The United States Supreme Court in **Michelson vs. United States,** 335 U.S. 469, 69 S. Ct. 213, 93 L.Ed. 168, condemned the practice of admitting evidence as to a defendants character in order to establish his guilt in a subsequent crime. This Court in **Michelson,** supra, stated:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt * * * The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.
>
> "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The over-riding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

What occurred in the Court below was improper and prejudicial. The unsolicited remark of the government agent clearly had but one implication. That implication

was that the Petitioner, ROSQUETTE was a known drug pusher. The remark could only have had the aforementioned connotation. This evidence was certainly inadmissible as direct testimony. The fact that it was brought out on cross examination should not effect its admissibility. It has been recognized by many courts that police officers, who are experienced witnesses, should refrain from making voluntary statements of evidence which are inadmissible and prejudicial to an accused. Several Federal cases have dealt with this question of officers or agents testimony. See **Odom v. United States,** 377 F.2d 853, (5th Cir. 1967); **Nals v. United States,** 240 F.2d 707 (5th Cir. 1967); **McMillian v. United States,** 363 F.2d 165 (5th Cir. 1966).

A review of those cases where a police officers volunteered evidence resulted in either a mistrial or a new trial is appropriate. In **Odum v. United States,** supra, an arresting officer in response to a question stated the following:

> "I had seen Mr. Odum come in and out of jail and spoke with him for approximately a year and a half."

In **Odum v. United States,** supra, a motion to strike was granted and the jury was advised to disregard the statement. In spite of the jury instruction the Fifth Circuit there held a mistrial should have been granted.

In **McMillian v. United States,** supra, an officer's hearsay testimony which indicated an automobile in question was involved with other illicit operations was held to be prejudicial and reversible error. This again despite

an instruction to the jury to disregard the testimony. To the same effect is the opinion of **Nals v. United States**, supra. See also **Harris v. State**, 204 P.2d 305 (Okla. 1949).

The testimony in the instant case is obviously more prejudicial than in the aforementioned opinions. Here Agent HEYMAN informed the jury that the Petitioner, ROSQUETTE was a documented trafficker in the files of the Bureau. The motion for mistrial was denied. The Court never instructed the jury to disregard the remark. Certainly, the admission of this testimony effected ROSQUETTE'S right to a fair trial. Further it is submitted that the testimony was so prejudicial as to deny all Defendants a fair trial. Therefore, the Petitioner NOA is likewise entitled to a new trial. As can be seen from the dialogue between Petitioner's counsel and the Court a motion to strike would have been fruitless. The Court did not feel the statement was improper and therefore obviously would not have granted a motion to strike or in the alternative have instructed the jury to disregard the remark. The Fifth Circuit's opinion relied heavily on the fact that a request for an instruction to the jury was not made. This logic fails.

The judgments and commitments against the Petitioners NOA and ROSQUETTE should be set aside and this case should be reviewed by this Court.

CONCLUSION

For the above reasons it is submitted that Writ of Certiorari in this case should be issued and the Court should consider this case on the merits.

Respectfully submitted,

RONALD FATH
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Miami, Florida

AFFIDAVIT

STATE OF FLORIDA :
: SS
COUNTY OF DADE :

I, RONALD FATH, first being duly sworn according to law, do depose and say:

I HEREBY CERTIFY that a copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon the Honorable Robert Rust, United States Attorney, Ainsley Building and Harold F. Keefe, Assistant United States Attorney, Ainsley Building, Suite 300, Miami, Florida this 16 day of October, 1972, by mailing a copy of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court.

RONALD FATH
Counsel for Petitioners

SWORN TO AND SUBSCRIBED TO
before me this 16th day
of October, 1972.

Sheryl A. Kellis
NOTARY PUBLIC, State of Florida
at Large.

My Commission Expires:

NOTARY PUBLIC, STATE of FLORIDA at LARGE
MY COMMISSION EXPIRES APRIL 5, 1975
BONDED THRU MAYNARD BONDING AGENCY

APPENDIX

APPENDIX.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1612

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANCISCO PENTADO, MANUEL NOA, RENE A. ROSQUETTE, RAFAEL PATINO, EDUARDO OCHOA, CLAUDINE LIEROS, a/k/a Milagros Filgueras and BENITO MAMERTO ALONSO,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(June 7, 1972)

Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: Appellants Rafael Patino, Benito Alonso, Manuel Noa, Eduardo Ochoa, Francisco S. Pentado, Rene A. Rosquette, and Claudine Lieros appeal from their joint trial and jury conviction for trafficking in heroin contrary to 21 U.S.C. §174 and 26 U.S.C. §§4704 (a) and 4705(a). All seven appellants contend that the jury was improperly constituted; that heroin was seized as a result of an illegal search; that certain firearms were

erroneously admitted into evidence; and that the court improperly instructed the jury on the issue of conspiracy. Appellants Alonso and Pentado argue that the evidence against them was insufficient to sustain their convictions and that the trial court erroneously refused to sever appellant Ochoa who asserted the defense of entrapment during the trial. Appellants Rosquette, Noa, and Patino claim they were arrested without probable cause. Appellant Rosquette contends individually that the evidence was insufficient to sustain his conviction and that his right to a fair trial was violated by a prejudicial statement from a government witness. And finally, appellant Noa contends he was also prejudiced by the statement concerning Rosquette. After considering each of these assignments of error we affirm the holding of the district court.

The events which led to the arrest of defendants began on November 20, 1970, when federal agent Peter Scrocca of the Bureau of Narcotics and Dangerous Drugs (BNDD) met with defendant Ochoa in New York City to negotiate the purchase of some narcotics. Acting in an undercover capacity, agent Scrocca agreed to purchase 20 kilograms (45 pounds) of heroin from Ochoa at a later date. The price was to be $360,000.00.

Pursuant to Ochoa's instructions, agent Scrocca went to Miami, Florida, and placed a telephone call to Ochoa on December 1, 1970, at the Sandman Motel. After several conversations it was agreed that undercover agent Heyman, also of the BNDD, would meet Ochoa and take him to Howard Johnson's Restaurant on Miami Beach where they would meet with agent Scrocca to finalize the transaction. At the meeting, attended by Scrocca, Heyman, Ochoa, and defendant Claudine Lieros, the parties decided

that agent Heyman would accompany Ochoa to the place where the heroin was located so Heyman could test the heroin before making the purchase.

Pursuant to this plan, Heyman, Ochoa and Lieros left the restaurant together and drove to the corner of Southwest 8th Street and 57th Avenue. Once the automobile was parked, Ochoa got out of the vehicle and told Heyman he was leaving to meet his "connection". When Ochoa returned he was in another automobile and accompanied by defendants Rosquette, Noa and Patino. Ochoa and Patino entered Heyman's automobile and, with Lieros, they drove to the Sandman Motel.

After receiving a telephone call from agent Scrocca, Heyman, Ochoa, Patino and Lieros left the motel and drove toward a residence at 1020 Northwest 31st Avenue. The party arrived at the address at approximately 1:00 A.M. on December 2, 1970.

Heyman entered the front of the house through an enclosed porch where he observed defendants Alonso and Pentado standing and watching. As he proceeded toward the living room, Heyman saw Rosquette and Noa and remarked to Patino, "What is this, a convention?" Patino laughed and replied, "No, these are part of the people involved in the deal".

Agent Heyman, Ochoa, Patino, Rosquette and Noa then walked out of the main house and into a separate guest house in back of the residence. In the kitchen of the guest house, agent Heyman began weighing and testing the heroin which was contained in small bags inside a styrofoam tub. While this process was going on Ochoa,

Patino, Rosquette and Noa were either in the kitchen helping agent Heyman or sitting in the living room which opened directly into the kitchen.

When agent Heyman finished checking the heroin he returned to the main house and telephoned agent Scrocca to inform him to bring the money to the corner of Northwest 31st Avenue and 11th Street. Heyman then drove his government-owned vehicle into the driveway of the residence where Ochoa and Patino loaded the tub of heroin into the automobile.

At this point agent Heyman, Ochoa and Patino left the residence in another car to meet agent Scrocca and pick up the money. After the $360,000.00 was exchanged Ochoa remained with Scrocca while Heyman returned to the residence with Patino.

The transaction completed, federal agents closed in and began making arrests. Ochoa was arrested as he climbed into agent Scrocca's automobile. Lieros, Pentado and Alonso were arrested at the residence shortly after agent Heyman returned. Noa, Rosquette and Patino left the residence in an automobile and, after driving a few blocks, they were arrested by an officer of the Miami Police Department acting under instructions from federal agents.

Defendants were tried jointly before a jury and convicted on all counts of a five-count indictment. In substance Count I alleged a conspiracy to violate 21 U.S.C. §174 by an agreement to import and sell heroin; Counts II and III charged defendants with the acts of importing, receiving and selling the heroin in violation of 21 U.S.C.

§174; and Counts IV and V related to selling heroin not in a stamped package and without a written order from Secretary of the Treasury, contrary to the provisions of 26 U.S.C. §§4704(a) and 4705(a).

The Jury Selection Plan

Appellants initially contend they were denied trial by a jury of their peers because persons of Spanish ancestry were systematically excluded from the jury list. Appellants immigrated to the United States from Cuba, and if their contention were true, the convictions in this case might have to be reversed. See Whitus v. Georgia, 1967, 385 U.S. 545. However, the burden is on appellants to demonstrate the exclusion of any particular group from jury service[1] and an examination of the record reveals no evidence of any exclusionary policy or practice. To the contrary, the Clerk of the United States District Court for the Southern District of Florida testified that no persons of Spanish ancestry, or any other cognizable groups, were excluded from jury duty. And finally, a jury selection plan substantially similar to the plan attacked here was approved by the court in United States v. Kuhn, 5 Cir. 1971, 441 F.2d 179.

Appellants further contend that the jury selection plan denied them equal protection of the law because citizens between the ages of 21 and 24 are excluded in certain years due to the fact that the jury wheel is refilled at five-year intervals. This same contention was specifically rejected by this court in United States v. Kuhn, supra. And for any matters not strictly within

[1]Hernandez v. Texas, 1954, 347 U.S. 475; Whitus v. Georgia, 1967, 385 U.S. 545.

Kuhn, there was no showing of a substantial non-compliance in that, considering the population of the District and the size of the master wheel, it was "practicable" (as the Plan phrases it) to have added the names of newly registered voters or that the absence of them could have produced any substantial effect on the fair cross-section concept.

Search and Seizure

Appellants' search and seizure claim concerns the 20 kilograms of heroin which Ochoa and Patino placed in the government-owned vehicle driven by agent Heyman. After the arrests were made, the vehicle was driven to police headquarters and the contraband removed. Appellants contend the government should have secured a search warrant before removing the narcotics from the automobile and that the heroin should have been excluded as evidence.

In support of this argument appellants cite the cases of Preston v. United States, 1964, 376 U.S. 364, and Dyke v. Taylor Implement Mfg. Co., 1968, 391 U.S. 216, for the proposition that a warrantless search of an automobile is improper once the accused is in custody. However, Preston and Dyke quite obviously involved automobiles belonging to or possessed by the defendants themselves. In the case at hand the evidence was removed from a vehicle owned by and in the exclusive possession of the government. We have discovered no case which would apply the Fourth Amendment in such an extreme situation and appellants' argument in this regard is totally without merit.

Admission of Firearms

At the trial the court admitted into evidence three firearms; a .22 caliber revolver found in an open dresser drawer in the main house; a .357 magnum revolver which defendant Noa voluntarily handed to police officers when arrested; and a Browning 9-millimeter pistol which was found underneath the front seat of the automobile in which Noa, Rosquette and Patino were arrested. Appellants claim the admission of these weapons was highly prejudicial to their case and not relevant to the issue of guilt or innocence of the crime charged.

We disagree. The trial court has great latitude in passing on the admissibility of evidence, and its determination must be considered an act of discretion not to be disturbed absent a clear showing of abuse. See Wangrow v. United States, 8 Cir. 1968, 399 F. 2d 106. Appellants in this case were charged with selling 45 pounds of narcotics worth approximately $360,000.00. It is certainly fair to assume that anyone engaging in a cash transaction of this magnitude would take steps against having the contraband or the purchase money stolen. The weapons had obvious probative value toward showing that the defendants took the natural precautions that might be expected when goods are sold for a large amount of cash. See United States v. Ravich, 2 Cir. 1970, 421 F. 2d 1196.

The Instruction on Conspiracy

In its instruction to the jury on Count I of the indictment, involving statutory conspiracy under 21 U.S.C. §174, the district court failed to instruct the jury

that knowledge of illegal importation of heroin was an essential element of the crime. Appellants contend this omission constitutes reversible error, citing the Second Circuit's decision in United States v. Massiah, 2 Cir. 1962, 307 F.2d 62, rev'd. on other grounds, 377 U.S. 201 (1964). This contention, however, ignores the jury's verdict on the other substantive counts in which knowledge of illegal importation was clearly charged. Since these other counts involved the same facts as the conspiracy count a verdict of guilty on all counts necessarily meant that the jury found that appellants knew the narcotics were illegally imported. Thus, any error in the conspiracy instruction was cured by the verdict of guilty on the other substantive counts. Indeed, this is the position adopted by the Second Circuit in cases decided after United States v. Massiah, supra; United States v. Baratta, 2 Cir. 1968, 397 F.2d 215; United States v. Chow, 2 Cir. 1968, 398 F.2d 596.

Failure to Grant Motion for Severance — Alonso and Pentado

Although he never testified, appellant Ochoa entered a plea of entrapment during the trial. Relying on the case of Bruton v. United States, 1963, 391 U.S. 123, appellants Alonso and Pentado contend the district court erroneously refused to grant their motion for severance. In Bruton, however, the Supreme Court was concerned with a confession from a co-defendant which inculpated Bruton. The confession was admitted into evidence at a joint trial and the co-defendant did not take the witness stand. The court held that Bruton's Sixth Amendment right of cross-examination was violated by such a procedure despite the jury instruction to disregard the confession as to Bruton.

In the case at hand there is an absence of any inculpatory testimony admitted into evidence in violation of Alonso's and Pentado's right to cross-examine witnesses against them. For that reason United States v. Bruton, supra, is inapplicable to the facts of this case.

The district court was well within its discretion in refusing to grant the motion for severance. Tillman v. United States, 5 Cir. 1969, 406 F.2d 930; Rule 14, Federal Rules of Criminal Procedure; Schneble v. Florida, 1972, ___U.S.___, 92 S.Ct.___, 31 L.Ed.2d 340; United States v. Russo, 5 Cir. 1972, ___F.2d___ [No. 71-2390, February 22, 1972].

Probable Cause for the Arrest of Rosquette, Noa and Patino

After the sale of the narcotics Rosquette, Noa and Patino left the residence in an automobile. As they drove away federal agents followed them in an unmarked vehicle. The agents that observed officer Mell of the Miami Police Department parked on the side of the street in his official patrol car. The agents pulled up beside Mell's automobile, identified themselves as federal officers, and told Mell to stop the car with the taillight out — meaning the vehicle driven by the three appellants.

Mell drove a few blocks and then stopped appellants' automobile. Noa, the driver of the automobile, got out of the vehicle and voluntarily informed Mell that he was armed. Mell took the pistol from Noa. Approximately three minutes later federal agents arrived on the scene and arrested appellants and took them into custody.

Appellants contend officer Mell lacked probable cause to make their arrest. We cannot agree. Probable cause may exist even though the arresting officer has observed no unlawful activity and is unaware of the identity of the accused. United States v. Sanchez, 5 Cir. 1969, 412 F.2d 1177. Turning to the facts of this case we note that Mell was directed by his superiors to station himself in a certain area of Miami. While in that area Mell was personally contacted by agents of the BNDD and informed that federal agents were conducting a narcotics investigation and that his assistance might be needed. Ten minutes later the same agents told Mell to stop the car with taillight out.

Under the circumstances we hold that the federal BNDD officers using reasonable caution were justified in believing that a felony had been committed and, hence, the requirement of probable cause is met, Wong Sun v. United States, 1963, 371 U.S. 471; Johnson v. Middlebrooks, 5 Cir., 1967, 333 F.2d 386. Cf. Whitley v. Warden, 1971, 401 U.S. 560, ____S.Ct.____, 23 L.Ed.2d 306.

Appellants also claim there was an unlawful working arrangement between federal and state officers. Federal agents ordered Mell to make the arrest, according to appellants, because the agents themselves lacked probable cause. As evidence of this proposition, appellants stress the fact the federal agents were directly behind appellants' automobile and could have easily made the arrest without Mell's assistance. However, the more logical explanation of the federal agent's failure to initiate the arrest was the fact that the agents were traveling in an unmarked vehicle while Mell commanded a marked automobile complete with siren and revolving light.

Rather than evincing a lack of probable cause, the failure of federal agents to stop appellants' vehicle simply shows the natural desire of the agents to make an arrest and incur the least amount of danger to themselves and the general public.

Prejudicial Statement by Government Witness — Rosquette and Noa

On direct examination federal agent Heyman identified Rosquette and Noa as being present in an automobile at a nighttime meeting on the corner of 8th Street and 57th Avenue. When cross-examined by Mr. Kleinfield, attorney for Rosquette and Noa, Heyman stated that he recognized Rosquette from pictures "because he is a documented trafficker in our files". Kleinfield immediately moved for a mistrial, and the court denied the motion.

On appeal Rosquette and Noa claim their right to a fair trial was prejudiced by this statement and that the district court erred in refusing to grant a mistrial. This argument is without merit. A review of the record reveals that attorney Kleinfield was attempting to discredit Heyman's testimony by a series of questions designed to show that Heyman may have been mistaken in his identification of appellants. Having adopted this strategy, appellants took the risk that Heyman would explain why he was so certain he recognized Rosquette. Appellants could have requested the court to instruct the jury to disregard the prejudicial statement but they declined to do so. The error complained of here was invited by appellants' own counsel and a reversal is not required. United States v. Davis, 5 Cir. 1971, 443 F.2d 560; and see Wright, Federal Practice and Procedure; Criminal, 362, §854.

As to Rosquette's claim that the evidence against him was insufficient to sustain his conviction, we have carefully reviewed the entire record and we find the evidence of his participation in the offense overwhelming.

Sufficiency of the Evidence — Alonso and Pentado

The government's case against Alonso and Pentado may be summarized as follows: Agent Heyman testified that he first saw Alonso and Pentado along with several of the other defendants at a meeting at the corner of Southwest 8th Street and Southwest 57th Avenue. Nothing said at this meeting was heard by either Alonso or Pentado since they remained in a separate automobile. As he arrived to pick up the heroin at 1:00 A.M. on December 2, 1970, agent Heyman again observed Alonso and Pentado inside an enclosed porch of the main house. When asked to describe what the two defendants were doing, Heyman replied that they appeared to be "watching".

After Heyman had proceeded from the porch to the living room, where several other defendants were standing, Heyman commented on the large number of people present at the residence. Defendant Patino replied that "[T]hese are part of the people involved in the deal". There was no evidence that Alonso and Pentado were within earshot of Patino when he made this statement.

After all the arrests were made, government investigators found Alonso's fingerprint on a paper bag which had been placed on top of the heroin within the styrofoam container.

Alonso and Pentado contend that the above evidence was insufficient to support a verdict of guilty against them, and that their motion for a directed verdict of acquittal should have been granted. We hold that the district court properly denied the motion.

In reviewing the sufficiency of the evidence in criminal cases based on circumstantial evidence, this court is bound by the principle that a conviction must be upheld where "reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accused's innocence". United States v. Warner, 5 Cir. 1971, 441 F.2d 821, 825. The evidence must of course be considered in the light most favorable to the government's case. United States v. Glasser, 1944, 315 U.S. 60.

Applying these standards to the evidence against Alonso and Pentado, we begin with the fact that all the defendants were charged with selling heroin worth approximately $360,000.00. For such an expensive illegal operation a seller might reasonably be expected to take precautions against detection by the authorities or theft by others engaged in the narcotics business. Alonso and Pentado were indisputably on the front porch of the main house "watching" when agent Heyman arrived. Since the residence and the surrounding grounds were not public property, it is significant that no innocent explanation appears from the record as to exactly why these two defendants were present at the site of a heroin sale at 1:00 o'clock in the morning. Compare Vick v. United States, 5 Cir. 1954, 216 F.2d 228, with Surrett v. United States, 5 Cir. 1970, 421 F.2d 403. At this point in the testimony, the jury could have properly inferred, to the exclusion of every other reasonable hypothesis, that Alonso

and Pentado were involved in the heroin transaction and that their purpose was to warn the others of possible danger from intruders. There is simply no other rational explanation for their presence at that time at that place, in view of all the circumstances of this case. It must be recalled that the other participants were taking extraordinary precautions to (i) prevent an underworld "double-cross" and (ii) avoid detection by the authorities. The whole bifurcated procedure for transferring the heroin at one location and the money at a separate location, blocking the heroin-loaded car in the driveway with a truck, carrying an arsenal of weapons, and other such abundantly cautious arrangements, actions and details lead inexorably to the conclusion that the participants were anxious to prevent some third party from relieving them of the fruits of their illegal enterprise. Having taken all of those precautions to prevent a "double-cross," it is absolutely incredible to hypothesize that the persons on the front porch "watching" were not lookouts posted to warn the others in the event that such a "double-cross" developed.

Moreover, there was an abundance of intrigue aimed at avoiding detection by the authorities. The interstate character of the transaction, the meeting on corners, the use of the back yard guest house instead of the main house to inspect the heroin, the relaying of messages through an intermediary at a motel testify convincingly of the extreme caution exercised in this regard. Not only is a lookout required to effectuate this goal, but it stretches credulity to conclude that these defendants would risk the exposure they had so carefully avoided by allowing an innocent by-passer — even a friend — to stumble upon their surreptitious activities by remaining during

the crucial hours of their $360,000 transaction. It is plainly unreasonable to infer that anyone else other than a participant would be allowed on the premises.

Under these circumstances, we hold that there is substantial evidence in the record to support the conviction of Alonso and Pentado.

Having considered all the assignments of error, the conviction of each defendant on all counts is hereby AFFIRMED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1612

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANCISCO PENTADO, MANUEL NOA,
RENE A. ROSQUETTE, RAFAEL PATINO,
EDUARDO OCHOA, CLAUDINE LIEROS,
a/k/a Milagros Filgueras and
BENITO MAMERTO ALONSO,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion June 7, 1972, 5 Cir., 1972, ____F.2d____).

(July 18, 1972)

Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX C

* * *

Q. I'm asking you, when you made this report, you indicated in the report that you had identified individuals and you named all of them, including Pintado, Alonso, Rosquette and Noa, as being at that area, is that right?

A. Yes, sir. I recognized Rosquette from pictures of Rosquette, because he is a documented trafficker in our files.

MR. MORAN: At this point I am going to have to make a motion for a mistrial.

THE COURT: Your motion is denied.

MR. MORAN: The answer is unresponsive and is highly prejudicial and has nothing to do with this case.

THE COURT: I don't want any argument. Your motion is denied. Proceed.

MR. KLEINFELD: The defendant Ochoa—

THE COURT: The motion will stand as though made on behalf of all defendants and will be denied as to all defendants.

Proceed.

APPENDIX D

• • •

MR. MORAN: Your Honor, just briefly in addition in support of my motion for a mistrial that was made on behalf of Mr. Rosquette as to the comment made by the witness, I would indicate to the Court that I have spoken with the United States Attorney and have reviewed the record of my defendant, and it does not reflect a conviction for a narcotics violation of any kind.

I would also point out to the Court, in addition to that, that this witness who made the remark was a trained witness, not a lay witness, and I think, under all the circumstances of the way it was stated and the nature of the specific reference, it has, in fact, denied my defendant his right to a fair and impartial trial.

THE COURT: That is not true at all. You have many opportunities on many matters in which you can prove that there has been no conviction if you desire to do so, as part of your case.

MR. MORAN: What I was pointing to, Judge, was the remark made by a trained witness with knowledge of the fact that this man had not been convicted, and to make a reference unsolicited in a narcotics case that a man is a known trafficker in cocaine, I think the cases are legion that that is ground for a mistrial and denies this man a fair and impartial trial.

THE COURT: I don't agree with you. The motion is denied.

MR. NEGRETTI: I intend to call Mr. Ochoa to the stand. If he is called to the stand, he will testify to events up to December 1. And it is my understanding of the law, Your Honor, that if he testifies only to events up to December 1st, he cannot be cross-examined as to any events subsequent to that date. I would like a ruling of the Court before placing him on the stand.

THE COURT: Why can't he be questioned as to other events? He can be questioned on matters that go to the credibility of his testimony, whether he testifies to it on direct or not.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 70-636-Cr-WM

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21 USC, Section 174 M/S NLT 5 NMT 20 — $20,000
26 USC, Section 4704(a) M/S NLT 2 NMT 10—$20,000
26 USC, Section 4705(a) M/S NLT 5 NMT 20—$20,000

UNITED STATES OF AMERICA

v.

RAFAEL PATINO, BENITO MEMERTO ALONSO, MANUEL NOA, EDUARDO OCHOA, FRANCISCO S. PINTADO, RENE B. ROSQUETTE, and MILAGROS FILQUERAS-LEGROS a/k/a Claudine Lieros

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INDICTMENT

The Grand Jury charges:

COUNT I

1. That beginning on or about November 25, 1970, and continuing to on or about December 2, 1970, in Miami, Dade County, in the Southern District of Florida, the defendants,

RAFAEL PATINO,

BENITO MEMERTO ALONSO,

MANUEL NOA,

EDUARDO OCHOA,

FRANCISCO S. PINTADO,

RENE B. ROSQUETTE, and

MILAGROS FILQUERAS-LEGROS
a/k/a Claudine Lieros,

and divers other persons presently to the Grand Jury unknown, did unlawfully, wilfully, knowingly and with intent to defraud, combine, conspire, confederate, agree, and have a tacit understanding with each other, to commit offenses against the United States of America, namely, in violation of Title 21, United States Code, Section 174.

2. It was a part of said conspiracy that the defendants would fraudulently and knowingly import and bring large amounts of narcotic drugs, to-wit: heroin, into the United States, contrary to law.

3. It was further a part of the conspiracy that the defendants would wilfully and knowingly receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of narcotic drugs, to-wit: heroin, after said narcotic drugs had been imported into the United States contrary to law.

4. It was further a part of the conspiracy that the defendants would conceal the existence of the conspiracy, and would take steps designed to prevent the disclosures of their activities.

That the defendants heretofore named did commit in furthance of said conspiracy and to effect the objects thereof the following overt acts:

OVERT ACTS

1. On November 23, 1970, Eduardo Ochoa met with Special Agent Harry Heyman and Special Agent Jack Lloyd of the Bureau of Narcotics and Dangerous Drugs at Sambo's Restaurant, 36th Street and Biscayne Boulevard, Miami, Florida.

2. On November 25, 1970, Eduardo Ochoa met with Special Agent Harry Heyman and Special Agent Jack Lloyd at S. W. Eighth Street and 12th Avenue, Miami, Florida.

3. On December 1, 1970, Special Agent Peter Scrocca, Special Agent Harry Heyman, Milgros Filqueras—Legros a/k/a Claudine Lieros and Eduardo Ochoa met at Howard Johnson's Restaurant, Collins Avenue and 163rd Street, Miami Beach, Florida.

4. On December 1, 1970, Eduardo Ochoa, Milagros Filqueras-Legros a/k/a Claudine Lieros, Rafael Patino and Special Agent Harry Heyman met at S. W. Eighth Street and 57th Avenue, Miami, Florida.

5. On December 2, 1970, Milagros Filqueras-Legros a/k/a Claudine Lieros, Rafael Patino, Edurado Ochoa and Special Agent Harry Heyman met at the Sandman Motel, 34th Street and Biscayne Boulevard, Miami, Florida.

6. On December 2, 1970, Rafael Patino, Benito Memerto Alonso, Manuel Noa, Eduardo Ochoa, Francisco S. Pintado, Rene B. Rosquette, and Milagros Filqueras-Legros a/k/a Claudine Lieros met at 1020 N. W. 31st Avenue, Miami, Florida.

All in violation of Title 21, United States Code, Section 174.

COUNT II

On or about December 2, 1970, at Miami, Dade County, in the Southern District of Florida, the defendants,

RAFAEL PATINO,
BENITO MEMERTO ALONSO,
MANUEL NOA,
EDUARDO OCHOA,
FRANCISCO S. PINTADO,
RENE B. ROSQUETTE, and
MILAGROS FILQUERAS-LEGROS
a/k/a Claudine Lieros,

did fraudulently and knowingly import and bring into the United States a narcotic drug, that is, approximately 20 kilograms of heroin, contrary to law; in violation of Title 21, United States Code, Section 174.

COUNT III

On or about December 2, 1970, at Miami, Dade County, in the Southern District of Florida, the defendants,

RAFAEL PATINO,
BENITO MEMERTO ALONSO,
MANUEL NOA,
EDUARDO OCHOA,
FRANCISCO S. PINTADO,
RENE B. ROSQUETTE, and
MILAGROS FILQUERAS-LEGROS
a/k/a Claudine Lieros,

did receive, conceal, sell or facilitate the transportation, concealment or sale of a quantity of narcotic drugs, to-wit: approximately 20 kilograms of heroin, which defendants then and there well knew had been imported and brought into the United States contrary to law; in violation of Title 21, United States Code, Section 174.

COUNT IV

On or about December 2, 1970, at Miami, Dade County, in the Southern District of Florida, the defendants,

RAFAEL PATINO,
BENITO MEMERTO ALONSO,
MANUEL NOA,
EDUARDO OCHOA,
FRANCISCO S. PINTADO,
RENE B. ROSQUETTE, and
MILAGROS FILQUERAS-LEGROS
a/k/a Claudine Lieros,

did knowingly and unlawfully purchase, sell, dispense and distribute a quantity of narcotic drugs, to-wit: approx-

imately 20 kilograms of heroin, not in and from the original stamped package; in violation of Title 26, United States Code, Section 4704(a).

COUNT V

On or about December 2, 1970, at Miami, Dade County, in the Southern District of Florida, the defendants,

RAFAEL PATINO,
BENITO MEMERTO ALONSO,
MANUEL NOA,
EDUARDO OCHOA,
FRANCISCO S. PINTADO,
RENE B. ROSQUETTE, and
MILAGROS FILQUERAS-LEGROS
a/k/a Claudine Lieros,

did knowingly and unlawfully barter, sell, exchange or give away an amount of narcotic drug, to-wit: approximately 20 kilograms of heroin, not in pursuance of a written order of the person to whom the said heroin was transferred on forms issued in blank for that purpose by the Secretary of the Treasury or his delegate; in violation of Title 26, United States Code, Section 4705(a).

A TRUE BILL

/s/ PHILIP G. JOHNSON

FOREMAN

ROBERT W. RUST
UNITED STATES ATTORNEY

By /s/ Harold F. Keefe
Harold J. Keefe
Assistant United States Attorney

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-708

MANUEL NOA AND RENE A. ROSQUETTE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with others in the United States District Court for the Southern District of Florida, petitioners were convicted on five counts charging them with heroin violations under 21 U.S.C. (1964 ed.) 174, 26 U.S.C. (1964 ed.) 4704(a) and 4705(a). The court of appeals affirmed in a lengthy opinion (Pet. App. A 1-15) and thereafter denied a petition for rehearing on July 18, 1972 (Pet. App. B 17-18). The petition for a writ of certiorari was not filed until November 9, 1972, and is therefore almost three months out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

492-240—72

Petitioners' sole contention is that reversal is required because of an allegedly prejudicial answer given on cross-examination by a government agent (see Pet. 4). This claim presents no issue of general importance and is fully answered in the opinion below, on which we primarily rely (Pet. App. A 11), which explains why the answer was invited by the line of inquiry petitioners' counsel was pursuing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

EDWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973